

“First Day” Proceedings and Procedural Change in the Senate

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Summary

In the early weeks of the 112th Congress, the Senate considered proposals to change its Standing Rules, as well as proposals to alter other practices and procedures. Three resolutions that proposed to amend the Senate rules (S.Res. 8, S.Res. 10, as amended, and S.Res. 21, as amended) received votes, but none were agreed to. These three resolutions proposed a variety of changes, chiefly focused on the operation of the Senate's cloture rule (Rule XXII). However, the Senate did agree to two proposals to establish new Senate standing orders (S.Res. 28 and S.Res. 29). S.Res. 28 established new requirements in relation to so-called "secret holds." S.Res. 29 altered the requirements for the reading of amendments. The proceedings on these measures occurred in the context of a debate over whether or not the start of a new Congress presents a unique opportunity for the Senate to change its Standing Rules without certain constraints presented by its existing rules. The proceedings at the beginning of the 112th Congress, however, did not ultimately provide any conclusion concerning this principle.

In the 113th Congress, there has been continued discussion of the potential significance of "first day" proceedings. This report is intended to provide context for understanding the issues raised by these proceedings, as well as an accounting of actions taken by the Senate at the start of the 112th Congress (with potential implications for actions the Senate may still take at the start of the 113th Congress).

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Introduction

In the early weeks of the 112th Congress, the Senate considered proposals to change its Standing Rules, as well as proposals to alter other practices and procedures.¹ Three resolutions that proposed to amend the Senate rules (S.Res. 8, S.Res. 10, as amended, and S.Res. 21, as amended) received votes, but none were agreed to. These three resolutions proposed a variety of changes, chiefly focused on the operation of the Senate's cloture rule (Rule XXII). However, the Senate did agree to two proposals to establish new Senate standing orders (S.Res. 28 and S.Res. 29). S.Res. 28 established new requirements in relation to so-called "secret holds." S.Res. 29 altered the requirements for the reading of amendments. The proceedings on these measures occurred in the context of a debate over whether or not the start of a new Congress presents a unique opportunity for the Senate to change its Standing Rules without certain constraints presented by its existing rules. The proceedings at the beginning of the 112th Congress, however, did not ultimately provide any conclusion concerning this principle.

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Recent Debate over the Operation of the Senate

In recent Congresses, there has been substantial attention to the way in which Senate rules and practices provide procedural prerogatives to individual Senators that, if exercised aggressively, can pose challenges to timely consideration of Senate business.² Specifically, some Senators believe the Senate increasingly seems to require either (1) unanimity to take certain actions (e.g., to proceed to a bill or to set a time for a vote) or (2) the support of a supermajority coalition (usually three-fifths of the Senate) and the significant expenditure of floor time to invoke cloture; they express concern that this situation prevents the Senate from effectively operating as a legislative body. In the 111th Congress, there was extensive attention given to these issues through a series of hearings held by the Senate Rules and Administration Committee. It was in this context that the Senate convened at the start of the 112th Congress, with many Senators seeking floor consideration of proposals to change the Senate Standing Rules. In addition, some supporters of rules changes attached special significance to these efforts and the procedural constraints under which they could operate if conducted at the convening of a new Congress. The importance of the timing of such efforts turns on one concept: the Senate as a "continuing body" and the question of "first day" proceedings.

¹ The debate in the 112th Congress over changes in Senate practices also extended to discussion over the way in which the Senate performs its advice and consent function in relation to Presidential appointments. Later in 2011, the Senate agreed to S.Res. 116, which created a new process for Senate consideration of over 200 executive branch nominations. The Senate also agreed to legislation (S. 679), which eventually became public law (P.L. 112-166), that eliminated the confirmation requirement for over 100 executive branch nominations. For more information, see CRS Report R41872, *Presidential Appointments, the Senate's Confirmation Process, and Changes Made in the 112th Congress*, by Maeve P. Carey.

² For an overview and analysis of different types of proposed changes to the Senate cloture rule (Rule XXII) in recent decades (including those submitted in the 113th Congress), see CRS Report R41342, *Proposals to Change the Operation of Cloture in the Senate*, by Christopher M. Davis and Valerie Heitshusen.

The Senate as a "Continuing Body"

The Senate has always operated on the principle that it is a "continuing body." The U.S. Constitution provides for overlapping Senate terms by which only one-third of the chamber's Members face the end of a term in office in any given two-year election cycle; therefore, two-thirds of Senate Members continue with uninterrupted terms between one two-year Congress and the next. Therefore, the number of Senators continuing their service exceeds the number that are constitutionally required (a simple majority) for a quorum. The result is that there is no point at the beginning of a new Congress at which the Senate could be said to lack the possibility of a constitutionally mandated quorum for processing chamber business.³

This principle has been interpreted to imply that the Senate is continuously organized across Congresses, as well. In other words, Senate rules continue to apply across Congresses with no action necessary from the body to readopt them.⁴ The Senate did not readopt its rules at the beginning of the 2nd Congress (1791-1792), and Standing Rules changes have always been accomplished in the context of the procedures and precedents established by the Standing Rules as they existed at the time. In 1959, the Senate explicitly incorporated this understanding into the Standing Rules, which state, "The Rules of the Senate shall continue from one Congress to the next Congress unless they are changed as provided in these rules" (Rule V, paragraph 2). In addition, the Senate treats so-called "standing orders"—simple resolutions that often govern Senate proceedings—as continuing to apply from one Congress to the next.

Because of the continued application of Senate rules, it has been said that Senate rules are "entrenched" in the sense that action to change the rules is constrained by existing rules that provide limited mechanisms to end debate on most questions.⁵ Specifically, agreeing to a proposal to change Senate Standing Rules only requires a majority of those present and voting; it is a potential cloture vote to end debate on the proposal that would require a supermajority (in the case of a Standing Rules change, two-thirds of Senators present and voting, pursuant to Rule XXII, paragraph 2). On occasions when the Senate has confronted the implications of such entrenchment for any efforts to change the Senate rules, some have argued that this situation is at odds with the Senate's constitutional power to determine its own rules—in effect, the rules require a supermajority coalition to support any rules change that has enough opponents for a successful filibuster.

³ The principle of the Senate's status as a continuing body was articulated on the Senate floor as early as the mid-1800s and has been affirmed in a variety of contexts since. (See Senator James Buchanan, remarks in the Senate, *Congressional Globe*, vol. 9, March 8, 1841, p. 240. Quoted in Luther Stearns Cushing, *Lex Parliamentaria Americana: Elements of the Law and Practice of Legislative Assemblies in the United States of America* (Boston: Little Brown, 1856; reprinted, n.p.: Fred B. Rothman Co, 1989), p. 993.) In contrast to the Senate, the House of Representatives has no Members who continue to serve one term across an election cycle; that body organizes itself anew at the start of each Congress.

⁴ In addition, elected officers of the Senate have continued to hold their position from one Congress until the next (although this was not the original practice with the President pro tempore), and in current practice, Senate committees retain their existing membership until replaced. See *Riddick's Senate Procedure*, p. 955 and pp. 382, 397.

⁵ For more information on the resulting "entrenchment" of Senate rules (in the sense that action to change them is constrained by existing rules that provide limited mechanisms to end debate on many questions), see CRS Report R42929, *Procedures for Considering Changes in Senate Rules*, by Richard S. Beth and CRS Report RL32843, *"Entrenchment" of Senate Procedure and the "Nuclear Option" for Change: Possible Proceedings and Their Implications*, by Richard S. Beth.

The Question of "First Day" Proceedings

Based on this perspective, some Senators have concluded that the effect of Rule XXII to require a supermajority to end debate on most questions makes the rule itself unconstitutional. Others contend that the rule is not inherently unconstitutional because the Senate should be able to establish its rules (including any requiring a supermajority to end debate, for example) as it sees fit; however, they suggest that, at the *start of each new Congress*, the chamber has the right and authority to adopt new rules outside of the constraints of the existing rules.⁶ This perspective accords a unique status to the commencement of a two-year Congress, arguing that the newly constituted Senate should be able to adopt new rules without the need to overcome potential dilatory actions by an opposed numerical minority.

It is in the context of this debate that the Senate began its proceedings in the 112th Congress. The 112th Senate initially convened on January 5, 2011, and several Senators submitted, on that calendar day, multiple proposals to change the Senate Standing Rules or to establish a new standing order.⁷ The Senate did not take up any of these proposals on that day, however. Pursuant to a unanimous consent request (and the provisions in S.Con.Res. 1), the Senate recessed on the January 5 and set its reconvening for January 25.

That the Senate *recessed* rather than *adjourned* on the January 5 is connected to the argument that the Senate could adopt new rules on the "first day" of a new Congress outside of the constraints of its existing rules, and turns on the distinction between a calendar day and a "legislative day." A new legislative day occurs only after the Senate has adjourned (rather than recessed) on the previous day it was in session. Thus, if the Senate recesses from one calendar day to the next (even overnight or for multiple calendar days), the Senate continues in the same legislative day. When the Senate reconvened on January 25, it was still the legislative day of January 5 (the date on which the 112th Senate initially convened). Those arguing that the Senate could only change its rules without concern for the constraints in existing rules (especially in regard to the need for supermajority support to end debate on a rules change) maintained that as long as the Senate remained in the same (first) legislative day, this principle should be made to apply to any rules change proposal considered.⁸ An interest in preserving the opportunity for a "first day" rules change appears to be the reason that the Senate recessed on the January 5 rather than adjourned.⁹ The 113th Congress also recessed at the conclusion of its first meeting on January 3, 2013, apparently for related reasons.

⁶ For a summary of extensive Senate floor debate on these perspectives, see, for example, U.S. Congress, Senate Committee on Rules and Administration, *Senate Cloture Rule, Limitation of Debate in the Congress of the United States and Legislative History of Paragraph 2 of Rule XXII of the Standing Rules of the United States Senate (Cloture Rule)*, committee print, 112th Cong. 1st sess. (Washington: GPO, 2011), pp. 199-208.

⁷ S.Res. 8 (Harkin), S.Res. 9 (Lautenberg), S.Res. 10 (T. Udall), S.Res. 11 (Wyden), S.Res. 12 (M. Udall), and S.Res. 13 (Franken).

⁸ There are multiple instances in which Senate rules and precedents distinguish between a calendar and a legislative day. The idea that the first day of a Congress is a unique opportunity for changing Senate rules (without the constraints of existing rules) does not flow from Senate rules, but from arguments made by various Senators and observers over the years; the rules are silent on the question of whether or not an extended legislative day is either sufficient or necessary for a rules change made without the constraints presented by the existing rules. See, for example, Senate floor debate summarized in U.S. Congress, Senate Committee on Rules and Administration, *Senate Cloture Rule, Limitation of Debate in the Congress of the United States and Legislative History of Paragraph 2 of Rule XXII of the Standing Rules of the United States Senate (Cloture Rule)*, committee print, 112th Cong. 1st sess. (Washington: GPO, 2011), pp. 199-208.

⁹ As will be discussed below, notwithstanding the actions that allowed the continuation of the same legislative day, later Senate consideration of some of the submitted proposals proceeded under the constraints of the existing rules.

Proposals to Change Standing Rules Considered at the Start of the 112th Congress

On January 5, 2011, when the Senate first convened for the 112th Congress, five resolutions were submitted by Senators that proposed some change to the Senate Standing Rules.¹⁰ An additional three were submitted when the Senate reconvened on January 25 (legislative day of January 5).

Several of these were referred to the Committee on Rules and Administration after their submission: S.Res. 9 (Lautenberg), S.Res. 12 (M. Udall), S.Res. 13 (Franken), S.Res. 16 (Ensign), and S.Res. 19 (Ensign).¹¹ The others¹² were all put on a section of the Calendar entitled "Resolutions and Motions Over, Under the Rule" on their day of introduction, which potentially made them available to be laid before the Senate under specific circumstances at a later date.¹³

This report provides a short summary description of only the rules change proposals that later received Senate floor consideration—S.Res. 8, S.Res. 10 (as amended), and S.Res. 21 (as amended). (For more analysis of a range of related goals in relation to the Senate and cloture-related issues, see CRS Report R41342, *Proposals to Change the Operation of Cloture in the Senate*, which categorizes proposals based on the overall goal of the proposed change and includes references to provisions in some of the other proposals mentioned above, but not detailed below.)

Provisions of S.Res. 8, 112th Congress (Harkin)¹⁴

Section 1 of S.Res. 8 ("A resolution amending the Standing Rules of the Senate to provide for cloture to be invoked with less than a three-fifths majority after additional debate"), submitted by

¹⁰ During the course of the 111th Congress, several rules changes proposals were also submitted, some of which mirror or overlap with those proposed in the 112th Congress. Several of these were the subject of extensive hearings held by the Senate Committee on Rules and Administration; the published hearing documents contain extensive testimony, data, and analyses of the operation of the cloture rule and some recent proposals for reform. See *Examining the Filibuster: Hearings before the Committee on Rules and Administration*, United States Senate, 111th Congress, 2nd sess., S. Hrg. 111-706 (available on-line at <http://www.gpo.gov/fdsys/pkg/CHRG-111shrg62210/pdf/CHRG-111shrg62210.pdf>). See also two CRS congressional distribution memoranda on selected proposals submitted in the 111th Congress: *S.Res. 416 (111th Congress): A Proposal to Change Senate Standing Rules* and *Two Proposals to Change Senate Standing Rules: S.Res. 440 and S.Res. 465 (111th Congress)*, both by Valerie Heitschusen and available to congressional clients from the author.

¹¹ The committee did not take any action on these referred resolutions.

¹² S.Res. 8, S.Res. 10, and S.Res. 21.

¹³ Rule XIV, paragraph 6, of the Senate Standing Rules provides that when objection is heard to a request on the floor the Senate's immediate consideration of a submitted resolution, it is to be placed on this portion of the calendar, to be then laid before the Senate on the next legislative day, after other morning business is completed, but before the close of morning business. These provisions for resolutions (and motions) are perhaps less well-known than other Rule XIV provisions that allow one Senator, through a series of floor actions taken over a two-day period, to have an introduced bill or joint resolution placed directly on the Calendar (without receiving a committee referral), thus making it then eligible for a motion to proceed to its consideration. The rules provisions in regard to resolutions operate differently, especially in connecting further consideration of such resolutions to the occurrence of morning business. (For further discussion of the provisions of Rule XIV as they relate to bills and joint resolutions, see CRS Report RS22309, *Senate Rule XIV Procedure for Placing Measures Directly on the Senate Calendar*, by Michael L. Koempel.)

¹⁴ Note that S.Res. 416 (111th Congress) is almost identical to Section 1 ("Modification of Cloture") of S.Res. 8 discussed here; a more detailed analysis of these provisions of S.Res. 8 can be found in the CRS congressional distribution memorandum *S.Res. 416 (111th Congress): A Proposal to Change Senate Standing Rules*, by Valerie Heitschusen (which is available from the author to congressional clients on request). Also note that S.Res. 5 in the 113th

Senator Tom Harkin on January 5, 2011, proposed changes to paragraph 2 of Rule XXII (the “cloture rule”) to require a declining number of votes to invoke cloture on successive cloture motions on the same question. Proposals of this nature have sometimes been referred to as a “ratchet” plan.¹⁵

Section 1 of S.Res. 8 proposed to add a new paragraph to Rule XXII. The new section would have provided that after a failed cloture vote on a question other than a rules change (in which less than three-fifths of Senators duly chosen and sworn had voted to end debate), additional cloture motions on the same question would be in order, but the threshold necessary to invoke cloture pursuant to each subsequent motion would drop by three votes until the threshold reaches a level equal to or less than a simple majority of Senators.¹⁶ This final cloture motion would then be agreed to only if a simple majority of Senators chosen and sworn agreed. For example, if there is no more than one vacancy in the Senate, the threshold would start at the 60 votes required under the current rule, but votes on subsequent cloture motions (on the same question) would drop to 57, then 54, then 51.

The proposal contained in S.Res. 8 would have retained existing Rule XXII timing provisions, such that cloture motions would lie over for two days prior to a vote and any post-cloture consideration would be limited to 30 hours. The proposal envisions sequential cloture processes (subject to lower a vote threshold each time)—such that each cloture iteration could consume approximately four to five days of Senate session—rather than actions that would allow for multiple filed cloture motions to simultaneously meet the two-day layover requirement (as sometimes currently may occur when cloture is filed on both a pending full-text substitute amendment and the bill itself).

Section 2 of S.Res. 8 proposed a process by which certain amendments could be offered at the conclusion of post-cloture debate of a measure. Specifically, it proposed that each party leader would be allowed to offer up to three germane “leadership” amendments, as long as each was pre-filed by the filing deadlines in Rule XXII. Debate on each of these amendments would be limited to one hour, equally divided, but none would be subject to a demand for division. This portion of S.Res. 8 was presumably intended to address concerns raised over the frequency with which amendment opportunities can be at least temporarily limited when the majority leader “fills the amendment tree.”¹⁷ In that vein, it sought to guarantee that the Senate consider and dispose of at least some germane pre-filed amendments (cleared by the respective party leadership).

Provisions of S.Res. 10, 112th Congress (T. Udall)

S.Res. 10 (“A resolution to improve the debate and consideration of legislative matters and nominations in the Senate”), submitted by Senator Tom Udall on January 5, 2011, proposed a variety of changes in relation to debate on motions to proceed and post-cloture consideration of nominations, “holds,” opportunities to offer amendments, and provisions to allow for an “extended debate” session. As discussed below, the Senate, by unanimous consent, adopted a full-text substitute amendment to S.Res. 10 during its floor consideration; the following explanation

Congress (which will be discussed later) is identical to S.Res. 8 discussed here.

¹⁵ In the past, some versions of such an idea limited the effect of such a proposal to cloture votes on nominations.

¹⁶ The proposal did not apply this ratchet process to a cloture motion on a measure or motion to amend Senate Standing Rules. The threshold for cloture on a rules change would therefore remain at the current two-thirds of Senators present and voting, assuming a quorum is present.

¹⁷ See CRS Report RS22854, *Filling the Amendment Tree in the Senate*, by Christopher M. Davis.

describes that version of S.Res. 10 (as amended by Senate Amendment 1 on January 27, 2011) rather than S.Res. 10 in its original form.

Section 1 proposed to remove from Rule VIII existing provisions for certain motions to proceed to be nondebatable if made during the morning hour.¹⁸ S.Res. 10 proposed to replace these rarely used exceptions in the rules with a blanket two-hour debate limit on all motions to proceed, except those motions to proceed that are already subject to no debate (pursuant to existing rules, precedents, and statutes).¹⁹

S.Res. 10, in Section 2, proposed to limit secret holds by prohibiting a Senator from objecting on behalf of another unnamed Senator. This portion of the proposal was intended to limit the use of so-called "secret holds" and subject such holds to greater transparency, a topic targeted in other resolutions submitted in recent Congresses (and addressed in S.Res. 28 from the 112th Congress, discussed later in this report).

Section 3 proposed to amend Rule XXII to allow, in the period between the filing of a cloture motion and the vote on that motion, the majority leader and the minority leader to each offer up to three germane amendments, if filed by the relevant deadline established by Rule XXII. The change would have provided up to one hour of debate, equally divided, on each such amendment, would prohibit division, and would subject each to a three-fifths vote for the Senate for approval. This element of S.Res. 10 was intended to address concerns raised in recent years over the practice of "filling the amendment tree" (and specifically its implications for opportunities for amending), as mentioned above in relation to Section 2 of S.Res. 8.

In Section 4, S.Res. 10 proposed to amend Rule XXII to provide for a session of extended debate after a cloture motion had received the support of a numerical majority of voting Senators but not reached the three-fifths threshold. This section mirrors language in S.Amdt. 2 (a complete substitute amendment to S.Res. 21), and is explained in more detail in the next section below.

Finally, S.Res. 10 proposed, in Section 5, that post-cloture debate on a nomination be limited to 2 hours, rather than to the 30-hour post-cloture consideration limit currently contained in Rule XXII.

Provisions of S.Res. 21, 112th Congress (Merkley)

S.Res. 21 ("A resolution to amend the Standing Rules of the Senate to provide procedures for extended debate"), submitted by Senator Merkley on January 25, proposed a process by which a numerical majority of the Senate could invoke cloture on a proposal if opponents did not take action to hold the floor in debate. By unanimous consent, the Senate adopted a full-text substitute amendment (Senate Amendment 2) during its consideration; it is the text of S.Res. 21, as amended, that is discussed in this report rather than its text as introduced.

S.Res. 21 proposed that if a numerical majority, but less than the required three-fifths of the Senate, voted for cloture on a measure or matter, then the Senate could enter a newly established "extended debate" session. During this session, Senators opposed to the question on which cloture was invoked could prevent a vote by holding the floor in debate, but not by forcing a majority of the Senate to attend to keep a quorum and vote. Specifically, the proposal provided that if no Senator sought recognition for debate (under additional new conditions that would

¹⁸ The Senate does not use these provisions because, in current practice, the Senate routinely dispenses with a morning hour, by unanimous consent, as well as other concerns over workability.

¹⁹ Specifically, non-debatable motions to proceed include those in relation to a specific item of executive business on the Executive Calendar (e.g., a nomination) and motions to proceed to privileged business (e.g., a conference report, a budget resolution). In addition, House amendments may be laid before the Senate without debate.

effectively dissuade opponents from making quorum calls or motions to adjourn), a vote on cloture could recur but with the required vote threshold being only a simple majority of the full Senate. The apparent intent of the proposal was to shift the burden of a filibuster from the supporters of ending debate to the opponents of a measure, such that opponents would only threaten a filibuster when they were willing to commit significant floor time to maintaining it, while also potentially allowing proponents to eventually end debate with a numerical majority if opponents were unable to continue holding the floor.

Senate Action on S.Res. 8, S.Res. 10, and S.Res. 21

On January 26, the Senate agreed to a unanimous consent (UC) request that at a time to be determined by the majority leader (in consultation with the minority leader), the Senate proceed to consider five resolutions, en bloc, including these three rules change proposals.²⁰ The UC agreement provided for up to eight hours of concurrent debate on the resolutions, provided for Senate agreement to full-text substitute amendments to S.Res. 10 and S.Res. 21, and provided for final votes on each of the three proposals. The agreement also set a threshold of two-thirds (of those voting) for Senate agreement to these three resolutions (as amended in two cases), and provided that any that failed to reach this threshold be returned to their previous status.

After extensive debate that day (and after votes on two standing orders, discussed later in this report), the Senate proceeded to vote on the three rules change proposals (as amended, in the case of S.Res. 10 and S.Res. 21). S.Res. 8 was not agreed to, by a vote of 12-84 (Rollcall Vote No. 4). Immediately thereafter, the Senate also rejected S.Res. 10 (as amended), 44-51 (Rollcall Vote No. 5). Finally, S.Res. 21 (as amended) was not agreed to by a vote of 46-49 (Rollcall Vote No. 6). Pursuant to the unanimous consent agreement, the three resolutions were returned to the "Over, Under the Rule" portion of the Senate Calendar of Business.²¹

Note that the Senate initially recessed (rather than adjourned) on January 5 so as to remain in the same legislative day when it reconvened on January 25—again, presumably to allow for consideration of proposed rules changes within the context of "first day" proceedings. However, the Senate actions on January 27, detailed above, were not taken within that context. The Senate adjourned on January 25, and met and later adjourned on January 26; thus January 27 was the third legislative day of the 112th Congress, not the first. In addition, the action the Senate took on these rules change proposals was pursuant to a unanimous consent agreement that, as noted earlier, set the vote threshold for each at two-thirds of those voting, which implicitly reflects the potential application of Senate Rule XXII's current requirement for a supermajority to invoke cloture on a rules change proposal. Thus, the Senate cannot be said to have taken action on these proposals under an understanding that changing the rules can necessarily be accomplished outside of the context of its existing rules on the first day. (It was no longer the first day, even if defined by a legislative day, and the votes taken were subject to a supermajority threshold, by unanimous consent.)²²

²⁰ See debate in the Senate, *Congressional Record*, daily edition, vol. 157, January 26, 2011, p. S265.

²¹ See footnote 13 for a discussion of the status of resolutions in this position on the Calendar.

²² Note also that the two party leaders, on January 27, 2011, engaged in a floor colloquy in which they each pledged to only infrequently engage in procedural actions or practices that were the object of concern on the part of other Senators. Specifically, the majority leader indicated he would only "infrequently" take actions to "fill the amendment tree," and the minority leader, in turn, said he would "use our procedural options with discretion." One specific action the minority leader appeared to be referring to was the practice of forcing an extended period of consideration on motions to proceed to measures, which some Senators said often directly resulted from concern over amending opportunities that could be limited when the majority leader filled the amendment tree. See debate in the Senate, *Congressional Record*, daily edition, vol. 157, January 27, 2011, p. S325.

Proposals to Establish Standing Orders Considered at the Start of the 112th Congress

Other proposals submitted at the start of the 112th Congress proposed new procedural regulations through establishment of a standing order rather than accomplished through a formal change in Senate Standing Rules. Standing orders agreed to by the Senate can govern Senate proceedings and are enforced as orders of the Senate; however, since they do not amend the Senate's Standing Rules, the provision in Rule XXII that subjects any proposals to change Senate Standing Rules to a two-thirds (of those present and voting) threshold for invoking cloture does not apply.

Therefore, one reason for proposing a procedural change via standing order rather than through amending Senate rules is that, should opponents consider actions that would delay or prevent a vote on the change, the threshold for invoking cloture on the standing order is only three-fifths of the Senate (60, if there is no more than one vacancy in the Senate) rather than two-thirds of those present and voting (a maximum of 67, if there are no vacancies and all Senators vote).

S.Res. 11 (Wyden) was submitted on January 5; S.Res. 23 (Inhofe) and S.Res. 24 (Merkley) were submitted on January 25, and S.Res. 28 (Wyden) and S.Res. 29 (M. Udall) were both submitted (and considered) on January 27. Of these, one was referred to the Rules and Administration Committee (S.Res. 23, "A resolution to prohibit unauthorized earmarks"). Two others—S.Res. 11²³ (relating to "secret holds") and S.Res. 24²⁴ (to provide new provisions for "extended debate")—were placed on the Calendar (under "Over, Under the Rule") upon objection to their immediate consideration on the day submitted. The only two discussed further below are the two that received Senate floor consideration: S.Res. 28 and S.Res. 29.

Provisions of S.Res. 28, 112th Congress (Wyden)

S.Res. 28 ("A resolution to establish a standing order of the Senate that a Senator publicly disclose a notice of intent to object to any measure or matter"), submitted by Senator Wyden on January 27, proposed a standing order to govern the disclosure of "secret holds"—that is, the indication a Senator provides to leadership indicating that he or she would object to taking a certain action on a measure or matter. Since the Senate frequently takes action through agreeing to unanimous consent requests, Senators are frequently asked informally prior to such a request whether or not they would consent to such a request; when a Senator indicates that he or she would not, the measure or matter is often said to have a "hold" on it, and leadership may need to decide whether or not to delay or indefinitely postpone such action until after an attempt to address any stated concerns.²⁵ S.Res. 28 proposed a process by which secret holds—that is, ones in which the Senator(s) opposing the request for action was not identified publicly—would be subject to greater transparency and accountability.²⁶ Specifically, the resolution established a process by which Senators are required to submit to leadership a notice of an intent to object, including language granting the leader the right to identify the Senator in question, as well as a

²³ Even though S.Res. 11 did not receive floor consideration, its main provisions were also found in S.Res. 28, which did.

²⁴ The proposal contained in S.Res. 24 was framed as a new standing order and did not receive floor consideration, although a substantially similar provision proposing a change to the Standing Rules was (as discussed above).

²⁵ For more detail on holds and the various purposes for which they might be utilized, see CRS Report 98-712, "*Holds in the Senate*," by Walter J. Oleszek.

²⁶ Various proposals to subject Senate holds to more transparency have been proposed in the past. For more detail, see CRS Report RL31685, *Proposals to Reform "Holds" in the Senate*, by Walter J. Oleszek, and CRS Report RL34255, *Senate Policy on "Holds": Action in the 110th Congress*, by Walter J. Oleszek.

time-line under which such notices are to be printed in a special section of the appropriate calendar and the *Congressional Record*—with information either identifying the Senator who placed the hold, or the Senator who objected on the unnamed Senator's behalf (if that Senator failed to follow the standards established to identify him or herself).

Provisions of S.Res. 29 (M. Udall)

S.Res. 29 ("A resolution to permit the waiving of the reading of an amendment if the text and adequate notice are provided"), submitted by Senator Mark Udall on January 27, proposed a standing order that would allow for a simple majority of voting Senators to waive the required reading of certain offered amendments. Senate Standing Rules provide that, in most circumstances,²⁷ amendments offered on the floor must be read (Rule XV, paragraph 1(a)); the reading of an amendment, however, is routinely waived by unanimous consent. On rare occasions, there will be objection to a request to waive the reading of an amendment, and in that case, a clerk must read the entire amendment in order for it to become pending for action.²⁸ S.Res. 29 proposed that the Senate allow the reading of an amendment to be waived by non-debatable motion if the amendment had been submitted at least 72 hours prior to the motion and is available in the *Congressional Record*.²⁹

Senate Action on S.Res. 28 and S.Res. 29

On January 26, the Senate agreed, by unanimous consent, to a period of limited debate and a final vote on both standing order proposals and the three rules change proposals discussed above.³⁰ In the agreement, the Senate established a 60-vote threshold for agreeing to S.Res. 28 and S.Res. 29. Since standing orders do not propose changes to the Senate's Standing Rules, cloture on such a measure, if needed, would require three-fifths of the Senate (60, if there is no more than one vacancy). That the Senate agreed to establish a 60-vote threshold for the proposal reflects the understanding that reaching a vote on a standing order proposal might require the support of three-fifths of the Senate on cloture.

On January 27, after extensive floor debate that day (concurrently addressing the two standing order proposals and the three rules change proposals discussed above), the Senate agreed to S.Res. 28 by a vote of 92-4 (Rollcall Vote No. 2). Immediately thereafter, S.Res. 29 was agreed to, 81-15 (Rollcall Vote No. 3). As standing orders continue in their application across Congresses (unless provided otherwise in the resolution), these two standing orders continue to apply, even into a new Congress, unless or until the Senate takes action to end their effect.

²⁷ Senate Rule XXII, paragraph 2, provides that an amendment need not be read after cloture has been invoked (that is, when the Senate is in post-cloture consideration of a measure) if the amendment has been available in printed form for at least 24 hours.

²⁸ Senators have sometimes employed such objections to force the reading of a lengthy amendment as a way to delay Senate action. See, for example, the Senate session on December 19, 2009, on which the full text of SA3276 (an amendment to H.R. 3590, the legislative vehicle for health care legislation) was read upon objection to a request to waive its reading (*Congressional Record*, December 19, 2009, daily edition, p.S31477).

²⁹ In other words, since the motion would be non-debatable, the Senate would vote immediately on any such motion made in regard to a qualifying amendment, and could therefore, with the support of a simple majority, waive the reading of the amendment.

³⁰ See debate in the Senate, *Congressional Record*, daily edition, vol. 157, January 26, 2011, p. S265.

Proposals to Change Standing Rules Submitted at the Start of the 113th Congress

On the first day of the 113th Congress, four resolutions seeking to change Senate Standing Rules were submitted: S.Res. 4 (T. Udall), S.Res. 5 (Harkin), S.Res. 6 (Merkley), and S.Res. 7 (Lautenberg).

S.Res. 4 ("To limit certain uses of the filibuster in the Senate to improve the legislative process"), submitted on January 3, 2013, by Senator Tom Udall, proposes four sets of changes to Senate Standing Rules. Section 1 would limit to two hours the consideration of all motions to proceed that are currently subject to no debate limit (other than through the successful invocation of cloture). Section 2 would create an "extended debate" session, summarized in the discussion of S.Res. 6 below. Section 3 seems intended to place a two-hour limit on post-cloture consideration of all nominations other than those to the Supreme Court.³¹ Finally, Section 4 proposes the establishment of one motion that would combine the current separate actions necessary for the Senate to arrange for a conference, subject to a two-hour limit on consideration and a simple majority vote.

S.Res. 5 ("A resolution amending the Standing Rules of the Senate to provide for cloture to be invoked with less than a three-fifths majority after additional debate"), submitted on behalf of Senator Harkin on January 3, proposes to require a declining number of votes to invoke cloture on successive cloture motions on the same question. Its provisions mirror those summarized above that were contained in S.Res. 8 (112th Congress).

S.Res. 6 ("To modify extended debate in the Senate to improve the legislative process"), submitted by Senator Merkley on January 3, proposes to establish the option of an "extended debate" session when a numerical majority of voting Senators, but not three-fifths of the Senate (or two-thirds for a rules change), have voted to invoke cloture on certain measures or matters. Its goals are very similar to those contained in S.Res. 21 and S.Res. 10 (both as amended) in the 112th Congress, discussed in detail above. In general, it seeks to require opponents of a question to hold the floor in debate (with limits on motions, quorum calls, and votes) without the requirement that a numerical majority be constantly present to respond to quorum calls or votes—potentially ending in a cloture vote that is subject to only a simple majority to end debate.

S.Res. 7 ("To permit the Senate to avoid unnecessary delay and vote on matters for which floor debate has ceased"), submitted on January 3 on behalf of Senator Lautenberg proposes that, under certain circumstances, a filed cloture motion could receive a vote after a shorter period than is currently the case under Rule XXII. In addition, it proposes to allow the majority leader to force a vote on the motion to proceed or executive nomination during post-cloture consideration if no Senator sought recognition to speak.³²

Each of these resolutions is, as of the date of this report, on the portion of the Senate Calendar of Business entitled "Resolutions and Motions Over, Under the Rule." As mentioned earlier, Senate Rule XIV, paragraph 6, provides that when objection is heard to a request on the floor for the

³¹ In regard to the intent of this portion of the proposal, see debate in the Senate, *Congressional Record*, daily edition, vol. 159, January 3, 2013, p. S10.

³² Its provisions closely mirror those in S.Res. 9 (112th Congress), as well as those in S.Res. 465 in the 111th Congress. A more detailed analysis of the provisions in S.Res. 465, 111th Congress, can be found *Two Proposals to Change Senate Standing Rules: S.Res. 440 and S.Res. 465 (111th Congress)*, by Valerie Heitshusen, which is available on request to congressional clients from the author.

Senate's immediate consideration of a submitted resolution, it is to be placed on this portion of the Calendar, to be then laid before the Senate on the next legislative day, after other morning business is completed, but before the close of morning business.³³ When these resolutions were submitted on the floor on January 3, 2013, there was objection to immediate consideration of each.³⁴

As noted earlier, the Senate on January 3, by unanimous consent, recessed until January 21, 2013. By recessing rather than adjourning, the Senate remains in the legislative day of January 3 (the day the 113th Congress convened); as at the start of the 112th Congress, this action seems to have been taken to allow any action on these or other rules change proposals to potentially take place in accordance with the "first day" principle explained earlier. Note, however, that the process by which any of these submitted resolutions could be brought to the Senate floor under the current provisions of the Standing Rules requires the Senate to proceed to the *next* legislative day and also to conduct a "morning hour." Utilizing this path could present a challenge to the "first day" argument (if premised on staying in the first legislative day of a new Congress), as well as require a morning hour process that the Senate does not use in current practice (and that presents its own challenges to arriving at a final vote in the face of determined opposition). In summary, by proceeding by unanimous consent, the Senate never took actions establishing whether or to what extent some special procedural circumstances apply on the "first day" (however defined).³⁵

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³³ While Rule VIII provides that the Senate have a "Morning Hour" on a new legislative day (which includes morning business), in current practice, the Senate (by unanimous consent) deems the Morning Hour to have expired (and otherwise provides for administrative business – e.g., the introduction of bills – that would otherwise occur during that time. Therefore, for the provisions of Rule XIV governing the consideration of resolutions in the "Over, Under the Rule" status to become effective, the Senate would need to break with its current practice of convening a new legislative day without a Morning Hour.

³⁴ See debate in the Senate, *Congressional Record*, daily edition, vol. 159, January 3, 2013, pp. S10-S12.

³⁵ For a more in-depth discussion of these and related issues, see CRS Report R42929, *Procedures for Considering Changes in Senate Rules*, by Richard S. Beth.